No. 92-1727

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

MADERA IRRIGATION DISTRICT
Petitioner
vs.
LAWRENCE F. HANCOCK, et al.
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

GREEN, GREEN & RIGBY
Denslow Green,
Counsel of Record
P.O. Box 1019
Madera, CA 93639
209-674-5656,
FAX 209-674-8228

BEST AVAILABLE COPY

15 pp

I.

TABLE OF CONTENTS

Page:

ARGUMENT: ..... 1.

A. INTRODUCTION ..... 1.

B. RESPONDENT IGNORES THE CLEAR CONSTITUTIONAL QUESTIONS PRESENTED ..... 1.

1. The Constitutional Issue: ..... 1.

C. THE CONFLICT WITH ALPINE RIDGE GROUP v. KEMP ..... 3.

D. THE RIGHT OF THE UNITED STATES TO RECOUP OPERATION AND MAINTENANCE CHARGES. ..... 3.

1. Respondents' Assertions: ..... 3.

2. The Agreed Price Under The 1951 Contract: ..... 3.

3. § 106 of P.L. 96-546 Is An Attempt By Congress To Increase The Price Paid For Water Under The 1951 Contract: ..... 4.

4. The Contract Provisions: ..... 5.

E. THE FIFTH AMENDMENT CASES ..... 6.

1. Vested Contract Rights
Are To Be Protected: ..... 6.

F. THE SURRENDER IN
UNMISTAKABLE TERMS CASES ..... 7.

1. In General: ..... 7.

G. HARMONIZING THE
TWO APPROACHES ..... 7.

1. The Need To Preserve
Sovereign Rights: ..... 7.

2. The Need To Preserve
Vested Contract Rights: ..... 8.

3. The Proper Test: ..... 8.

H. DOES MADERA'S CONTRACT
CONTAIN AN UNMISTAKABLE
WAIVER ..... 9.

1. How The Waiver Is Made: ..... 9.

2. What Constitutes An
Unmistakable Waiver? ..... 9.

CONCLUSION ..... 10.

II.

TABLE OF AUTHORITIES

CASES:

Page

Bowen v. Agencies Opp. To Soc. Sec. Entrapment,
477 US 41, 91 L.Ed 2d 35, 106 S. Ct. 2390 (1986) ..... 7.

Cisneros v. Alpine Ridge Group,
123 L Ed2d 572, 113, S Ct 1898 (1993) ..... 3.

Home Building & Loan Assn. v. Blaisdell,
290 US 398, 78 L Ed 413, 54 S Ct 231 (1934) ..... 7.

Lynch v. United States, 292 US 571,
78 L Ed 1434, 54S Ct 840 (1934) ..... 6.

Perry v. United States, 294 US 350-351,
79 L Ed 912, 55 S. Ct 432 (1934) ..... 6.

Sinking Fund Cases 99 US 700,
25 L Ed 496 (1878), ... 6.

St. Louis v. United R. Co., 210 US 266,
52 L Ed 1045, 28 S Ct 630 (1930) ..... 7.

United States v. Larionoff, 431 US 864,
53 L Ed 2d 48, 97 S Ct 2150 ..... 6.

Merrion v. Jacarilla Apache Tribe, 455 US 130,
71 L Ed2d 21, 102 S Ct 894 (1982). ..... 7.

Veix v. Sixth Ward Building and
Loan Assn. of Newark, 310 US 32,
84 L Ed 1061, 60 S Ct 972 (1940) ..... 7.

Alpine Ridge Group v. Kemp, 955 F.2d
1382, (9th Cir.), reversed on other grounds,
123 L Ed2d 572, 113, S Ct 1898 ..... 3.

STATUTES:

743 USC § 485h(e) ..... 3.

Section 106 of Pub. L. No. 96-546..... 2.

ARGUMENT

A. INTRODUCTION.

The United States and Madera agreed that Madera would transfer its dam site and water rights, required for the irrigation of the land within the district, in return for a contractual promise by the United States to furnish a permanent water supply at a price no higher than that charged to others. If a subsequent Congress is allowed to repudiate that right in order to gain revenue, what faith and trust can our people have for promises given by our government?

Are the Fifth Amendment and the cases protecting vested contractual rights now without meaning where those rights are taken by subsequent Congressional Acts?

Is the long line of cases which afford protection under the Fifth Amendment to be ignored or overruled by applying the "surrender in unmistakable terms of the exercise of the sovereign power" test to legislation which abrogates contractual rights for the sole purpose of increasing revenue to the United States?

These are the questions raised in this case; questions which need the decision of this Court to clarify what now constitutes an unanswered conflict between two diametrically opposed lines of prior decisions of this Court.

B. RESPONDENT IGNORES THE CLEAR CONSTITUTIONAL QUESTION PRESENTED.

1. The Constitutional Issue:

Madera has, and the Circuit Court recognized, a

constitutionally protected vested right of renewal of its contract, which by its terms is to be at a price for water delivery no higher than that charged to other Friant Contractors.

Congress, in adopting Public L. No. 96-546[1] attempts to recoup, as a condition to contract renewal, a payment by Madera of $5,200,000 more than the agreed price for delivery made under the 1951 contract which also constitutes a charge of $5,200,000 more than the amount charged to other Friant Contractors for water delivered under the renewed contract.

Respondents and the Circuit Court justify the denial of Madera's rights on the basis that there is no showing of a "surrender in unmistakable terms of the exercise of the sovereign power".

They ignore, however, the whole line of cases cited herein which hold vested rights are protected by the Fifth Amendment from subsequent Congressional action enacted solely for the purpose of raising money.

They further ignore that each case which invoked the "surrender in unmistakable terms" doctrine was a case involving the exercise of the police or taxing power of the sovereign.

Respondents do not address the issue of whether the Contract provisions constitute a surrender in unmistakable terms if that test were applicable.

*****
*****
*****

---

[1] See APENDIX D to PETITION: page 1.

C. THE CONFLICT WITH *ALPINE RIDGE GROUP v. KEMP*.

At footnote 2 on page 9 of their Opposition Brief, Respondents assert that *Alpine Ridge* is no longer in conflict with this case as it was reversed on appeal by this Court in *Cisneros v. Alpine Ridge Group*, 123 L Ed2d 572, 113, S Ct 1898 (1993). What Respondents failed to state, however, was that the reversal was on other grounds than the Constitutional issues set forth therein and the Court specifically stated it would not consider the Constitutional issues.

D. THE RIGHT OF THE UNITED STATES TO RECOUP OPERATION AND MAINTENANCE CHARGES.

1. Respondents' Assertions:

Respondents assert[2] that nothing in the contract precludes the government from setting rates which would recoup O&M losses. We agree that recoupment may be made, but not by the method set forth in P.L. 96-546 § 106.

2. The Agreed Price Under the 1951 Contract:

Under the provisions of 43 USC § 485h(e) the Secretary was empowered to exercise discretion:

> ". . . the Secretary, in his discretion may enter into either short term or long term contracts to furnish water for irrigation purposes. Each such contract shall be for such period, not to exceed forty years, and at such rates as in the

---

[2] Respondents Brief in Opposition: page 9.

Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance costs and an appropriate share of such fixed charges as the Secretary deems proper, . . ." (Emphasis added)

The Secretary in exercising the discretion vested in him by 9(e) set the rate for the Friant Unit of the Project at no more than $3.50 per acre foot for Class 1 and $1.50 for Class 2 for the 40 year term of the contracts. These rates were set forth in the Contracts. At the time these rates were set they were considered exceedingly high by the districts. The falling groundwater could be pumped for 50¢ per acre foot and the firm supply of surface water was seven times as high. In spite of this discrepancy Madera knew that the surface supply was necessary to the future continued ability to produce irrigated crops and executed the 1951 Contract.

3. § 106 of P.L. 96-546 Is An Attempt By Congress To Increase The Price Paid For Water Under The 1951 Contract.

Congress, in adopting § 106 of P.L. 96-546 attempted to undo what it had authorized the Secretary to do and to require Madera to pay $5,200,000 more for water delivered under the 1951 Contract than the contracted amount. Respondents' and the Circuit Court's attempt to designate this as a charge for water delivered under the renewal contracts is an attempt to obscure what Congress has ordered. The law states:

"The Secretary . . . shall include in each new or amended contract for delivery of water . . . provisions ensuring that any annual deficit (outstanding or hereafter arising) incurred by a Central Valley Project water contractor in the

payment of operation and maintenance costs . . . is repaid by such contractor under the terms of such . . . contract." (Emphasis added)

This is a clear requirement by Congress to extract from the District a repayment of a higher charge for water delivered under the 1951 Contract than the contracted rate which was paid thereunder. What the Act is saying is that while Congress had given the Secretary the discretionary power to set contract rates, that a new Congress 33 years later did not like the rates he set and decided to change the contract rates and require payment thereof as a condition of renewal.

It does not assist Respondents to call the extraction of the $5,200,000 difference between what the United States agreed it would deliver water for under the 1951 Contract and what it now demands be paid under that contract "a charge for water under the new contract". In the first instance, the statute is clearly one which requires repayment of an amount in excess of the agreed charge. Secondly, if it is an additional charge for new water, Madera has a recognized Constitutional right of renewal and the imposition of a required payment of $5,200,000 for water delivered under the old contract as a condition precedent to exercising its Constitutionally recognized renewal right makes that right meaningless.

4. The Contract Provisions:

The 1951 Contract Provided that:

"Under Part A [the water service portion of the contract] and under succeeding contracts, the rates to be charged to the District for water service shall not exceed charges made to others than the District for the same class of water and

service from Friant Dam and Reservoir."

Like its right to renew, these provisions of the Contracts created vested rights in Madera which are to be protected by the Fifth Amendment.

Madera is being charged $5,200,000 more for delivery of water for an O&M deficit under the 1951 Contract than Gravely Ford Water District which had zero O&M deficit.

Respondents and the Circuit Court attempt to explain away this discrepancy by stating that Madera has a better "service" than Gravely Ford.

This statement is simply not true. In the Friant Unit there are two classes of water, Class 1 and Class 2. The same type of service is provided to each contractor such as scheduling and delivery. Gravely Ford receives its water from the Madera Canal as does Madera and uses Madera's distribution system to carry the water to its boundaries. The "service" both receive [and the "service" of every Friant Contractor] are exactly the same, yet Madera is charged $5,200,000 more than Gravely Ford for water delivered under a renewal contract.

E. THE FIFTH AMENDMENT CASES.

1. Vested Contract Rights Are To Be Protected:

In the Petition we cited and quoted from *Lynch v. United States*, 292 US 571, 78 L Ed 1474 (1933), *Perry v. United States, 294 US 350-351, 79 L Ed 912*, 55 S. Ct 432 (1934) to *United States v. Larionoff* 431 US 864, 53 L Ed2d 48, 97 S Ct 2150 (1977) which hold vested rights are protected by the Fifth Amendment from subsequent Congressional action enacted solely for the purpose of

raising money. These cases were cited with approval in *Bowen v. Agencies Opp. To Soc. Sec. Entrapment,* 477 US 41, 91 L Ed2d 45, 106 S Ct 2390 (1986).

F. THE SURRENDER IN UNMISTAKABLE TERMS CASES.

1. In General:

As contrasted to the Fifth Amendment Cases an examination of the cases cited below which apply the retention of the power of the sovereign to abrogate contractual rights by subsequent legislation unless the right is surrendered in unmistakable terms involves statutes which invoke either the police power or the taxing power of the sovereign. None of them relate to abrogation of a contractual right for the sole purpose of saving money for the government.

The most recent case is *Bowen v. Agencies Opp. To Soc. Sec. Entrapoment, supra,* which quotes from *Merrion v. Jacarilla Apache Tribe,* 455 US 130, 71 L Ed2d 21, 102 S Ct 894 (1982). *Merrion* relies on *Veix v. Sixth Ward Building and Loan Assn. of Newark,* 310 US 32, 84 L Ed 1061, 60 S Ct 972 (1940), *Home Building & Loan Assn. v. Blaisdell,* 290 US 398, 78 L Ed 413, 54 S Ct 231 (1934) and *St. Louis v. United R. Co.,* 210 US 266, 52 L Ed 1045, 28 S Ct 630 (1930)

G. HARMONIZING THE TWO APPROACHES.

1. The Need To Preserve Sovereign Rights:

We recognize the need to preserve the rights of the Sovereign to act under its Sovereign Powers such as the Police or Taxing Powers to effect existing contracts. Such results can be easily seen in the Central Valley Project where restrictions of Delta exports under ESA

and NEPA have reduced contract deliveries to some districts by as much as 50%.

2. The Need to Preserve Vested Contractual Rights:

Madera gave up its dam site and water rights which were vital to continued irrigated agricultural production in return for a promise by the United States to provide them with a permanent supply of water through successive contracts at a price no higher than that charged to others. This vested right is of grave importance to the landowners in the District and should not be lightly put aside.

3. The Proper Test:

If Madera's vested rights are impacted by subsequent Congressional action based on one of the Sovereign's inherent powers such as the Police Power or the Taxing Power, then inquiry should be made to see if the Contract "waives in unmistakable terms" the Sovereign Power in question.

If on the other hand, Madera's vested rights are impacted by subsequent Congressional action based on a statute whose only purpose is to increase payments to the United States, and the impact constitutes a derogation of substantial contractual rights, the Fifth Amendment should be applied to protect the vested right. The $5,200,000 payment as a condition of renewal is certainly a derogation of substantial contractual rights.

*****
*****
*****
*****

H. DOES MADERA'S CONTRACT CONTAIN AN UNMISTAKABLE WAIVER?

1. How The Waiver Is Made:

While it might be considered that the waiver would be made by Congress in the statute authorizing the contract, the cases make it clear that we look to the contract to determine if the waiver is made. (See *St. Louis v. United R. Co. supra,* 52 L Ed at 1058 and *Merrion v. Jacarilla Apache Tribe, supra,* 71 L Ed2d at 36)

2. What Constitutes An Unmistakable Waiver?

We clearly feel that the unmistakable waiver test does not apply to Madera, but if it did, such a waiver is present.

We sincerely doubt that there has ever been, or will never be, a contract executed by the United States which states:

> "The United States hereby surrenders in unmistakable terms its Sovereign Right to abrogate any term of this contract by subsequent Congressional Action."

It would appear, therefore, that the intent of the parties at the time the contract was executed must be examined to see if there has in fact been a surrender.

Madera not only gave up its dam site and water rights in return for a promise of a permanent supply of water from the project, the contract states that but for such assurance, the transfer of those properties would not and could not be made.

Was it the intention of the parties that Congress,

acting under the Police Power, could have terminated Madera's right to receive its water and transferred the water to Los Angeles? We think not. Unless there is some circumstance showing that a unmistakable surrender can in fact be made, the test is worthless. Instead of applying the test, the Court must change the rule to provide that any contract right can be abrogated by subsequent Congressional action.

CONCLUSION

This case is not only of vital importance to Madera, it presents Constitutional issues that need clarifying and resolving for the benefit of all who contract with the government. Can the contractual promise by the United States be relied upon or can the United States nullify at will any contract it makes?

Certiorari should be granted.

Dated: July 8, 1993

GREEN, GREEN & RIGBY

By: _____
Denslow Green
Attorneys for Petitioner
Madera Irrigation District